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Issue Date: 30 October 2003

Case No: 2001-BLA 1072

In the Matter of:

DENVER BROCK
Claimant

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS
Respondent

APPEARANCES:

Phillip Lewis, Esquire
Counsel for Claimant

Neil A. Morholt, Esquire
For the Director

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

A formal hearing was held in Hazard, Kentucky on August 14, 2003. The parties were afforded full opportunity to present evidence and argue at the hearing, as provided in the Act and the regulations issued thereunder. The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX and CX refer to the exhibits of the Director and claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Mr. Denver Brock filed a claim for benefits on June 10, 2000. He previously filed for benefits under the Act in 1976, (DX 23), but was denied and the claim was administratively closed in 1994 after two remands and two decisions by the Benefits Review Board. *See, Brock v. Director*, 93-BRB-1178 (1994)(unpublished). The District Director denied benefits under the instant claim stating that Mr. Brock failed to show:

1. That he has pneumoconiosis as defined by the Act and the regulations;
2. That his pneumoconiosis arose out of coal mine employment;
3. That he is totally disabled due to pneumoconiosis. *Id.*

Factual Background

Mr. Denver Brock is a 73 year old former coal miner with a 6th grade education. (TR. p. 10). Mr. Brock performed several jobs including cutting and loading coal. When questioned about his smoking history at the hearing, he did not deny smoking two packs per day for approximately 36 years, then quitting some 25 years ago. (TR. p.18-20). Based on a similar statement in the examining physician's report, I make the finding that Mr. Brock has a smoking history of 35 years at two packs per day until 1975. (DX 7).

The length of the miner's qualifying coal mine employment determines which legal presumptions, if any, apply to the evidence presented. *Gibson v. Director, OWCP*, 1 BLR 1-1016, 1-1018 (1978). The claimant bears the burden of proof in establishing the length of coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). The Director stipulated at the hearing that Mr. Brock worked for ten (10) years in the coal mines but the claimant alleged on his application for benefits that he worked for 29 years in the mines (TR. p.9, DX 1). However, the Benefits Review Board in *Brock v. Director*, affirmed the decision of the Administrative Law Judge who made a finding of 12.5 years of coal mine employment based on the earnings reported to the Social Security Administration. *See, Brock v. Director*, 84-BLA-4242 (Feb. 9, 1993). In subsequent appeals, Mr. Brock did not contest this finding and therefore, I conclude that the Claimant worked for 12.5 years in or around the Nations's coal mines.

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See,* 20 C.F.R. § 718.101 to 718.107. The regulations

address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

At the formal hearing on August 14, 2003, the following subsequently obtained medical evidence was submitted:

A. X-ray reports

Original Reports:

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 9	08/17/00	08/17/00	Baker/B-Reader*	1/0, qual 2, underexposed
DX 10	08/17/00	09/06/00	Sargent/BC, B-Reader	Neg, qual 1, granuloma in rt lobe
DX 12	08/17/00	09/22/00	Barrett/BC, B-Reader	Neg, qual 2

Newly Submitted:

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
CX 2	07/08/02	07/15/02	Cappiello/B-Reader*	1/1, qual 1
CX 2	07/08/02	07/17/02	Pathak/B-Reader*	1/1, qual 1
CX 3	07/08/02	07/24/03	Aycoth/B-reader*	1/0, qual 1
DX 26	07/08/02	07/28/03	Barrett/BC, B-Reader	Neg, qual 1

* I take Judicial Notice of these readers' qualifications through the National Institute of Public Safety's website listing at http://www.cdc.gov/niosh/readstat.html in accordance with Fed. R. Evid. 201(b)(2).

B. Pulmonary Function Studies

Original:

Exhibit	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 6	Baker	69/68"	2.65	3.51	75	75.5%	Yes	Coop fair / comp good

C. Arterial Blood Gas Studies

Original:

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 8	08/17/00	Baker	35	83	Resting	

D. Narrative Medical Evidence

Original:

Glen Baker, M.D., examined Mr. Brock on August 15, 2000, conducting an employment, patient and family history. (DX 7). The doctor's qualifications were not included with his opinion. *Id.* Dr. Baker recorded a two-pack per day cigarette smoking history and upon auscultation, noted decreased breath sounds. *Id.* Dr. Baker conducted several studies including an x-ray (1/0 reading with a quality of 2), arterial blood gas studies (normal) and pulmonary function tests (decreased FEV_1). *Id.*

Dr. Baker diagnosed Mr. Brock with pneumoconiosis based on his abnormal chest x-ray; chronic obstructive pulmonary disease (COPD with mild obstructive defect evidenced by the pulmonary function studies); and chronic bronchitis (due to cough history, wheezing and sputum production). In Dr. Baker's consultative report he opines that the etiologies for these diagnoses are coal dust exposure (pneumoconiosis) along with cigarette smoking (COPD and chronic bronchitis). Although diagnosed with a mild impairment, Dr. Baker feels that Mr. Brock has the respiratory capacity to return to coal mine employment. (DX 7).

Newly Submitted:

Roy Varghese, M.D., as Mr. Brock's treating physician at Mary Breckinridge Hospital, submitted a medical opinion concerning the existence of Mr. Brock's pneumoconiosis or other breathing impairment. (CX 4) The doctor's qualifications do not appear in the record. It is Dr. Varghese's opinion that Mr. Brock suffers from pneumoconiosis and is totally disabled. (CX 4). In his surgically-related treatment of Mr. Brock over the years, Dr. Varghese observed a progressive worsening of his breathing including shortness of breath, complaints of smothering, trouble sleeping, and engaging in any physical activities. *Id.* To reach his conclusions, Dr. Varghese relied on his own observations, his experiences treating other coal miners and his clinical evaluations, as well as, preliminary test results conducted prior to Mr. Brock's cardiovascular surgeries. *Id.* He also reviewed the medical evidence summarized above including the July 8, 2002 x-ray.

After a review of Mr. Brock's employment history, it is Dr. Varghese's contention that Mr. Brock's pneumoconiosis is substantially caused by the inhalation of coal dust with his smoking history being a lesser contributing factor. He states that Mr. Brock is unable to return to coal mine employment or any other comparable work. (CX 4).

DISCUSSION AND APPLICABLE LAW

Threshold Issue for Refiled Claims

Where Mr. Brock's previous claim was administratively closed after denial, his subsequent claim must also be denied unless a material change of condition has taken place since the denial of the prior claim. 20 C.F.R. § 725.309.[1] As a result, I will examine the evidence submitted subsequent to the prior denial and compare it to the previously submitted evidence to see if a material change in condition has been established. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). Whether "the newly submitted evidence differs qualitatively from the previously submitted evidence" is the test under *Sharondale Corp.* since this case arose in that circuit. The Sixth Circuit held:

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element… [t]hen the ALJ must consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement of benefits. 42 F.3d 993, 997-998 (6th Cir. 1994).

Thereafter, the Court in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, held that it is insufficient for the Administrative Law Judge to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. 264 F.3d 602 (6th Cir. 2001). Rather, the court stated that the Administrative Law Judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence "is substantially more supportive of claimant." *Id.* Although the Administrative Law Judge did not conduct a comparison of the old and new evidence to determine whether the new evidence was "substantially more supportive," the Court in *Kirk*, nevertheless, affirmed the finding of "material change" as supported by the record as a whole. *Id.*

If the Claimant in the instant case cannot establish this "material change in condition" as defined by the Sixth Circuit, then principles of *res judicata* apply and the claim must be denied. *Sharondale* at 997-998. It is legal error for an Administrative Law Judge not to show that there

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1 This claim was pending at the time of the revision, thus the pre-revision language of the Act will be applied. Pre-revision 20 C.F.R. § 725.309(d) provides:

> In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

was a worsening of Claimant's condition on the element selected to show a material change. *Kirk*, 264 F.3d 602. The Claimant must show that the sum of the newly submitted evidence is "substantially more supportive" than the sum of the original evidence submitted with the recent claim. *Id.* I will address this comparison in the context of the elements of entitlement.

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: by chest X-ray, a biopsy or autopsy, by presumption under §§ 718.304, 718.305. or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201.[2] 20 C.F.R. § 718.202(a). Pneumoconiosis is defined in § 718.201 as a chronic dust disease arising out of coal mine employment. It is within the Administrative Law Judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An Administrative Law Judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

1. The X-ray Evidence:

The original x-ray evidence consists of one x-ray and three interpretations. (DX 9-10, 12). This 2000 x-ray resulted in two negative interpretations and one positive for pneumoconiosis. *Id.* One of the negative interpretations showed calcified granuloma in the right lobe and was rated a film quality of "1" while the others were rated a "2" for film quality. *Id.* The two negative readings were done by B-readers who were also Board-certified radiologists. (DX 10, 12). The positive interpretation came from a less qualified B-reader. (DX 9); *Sheckler v. Clinch field Coal Company*, 7 BLR 1-128 (1984)(Board-certified readers have superior qualifications over B-readers).

Interpretations of the subsequent 2002 x-ray include three positive readings for pneumoconiosis and one negative interpretation. (CX 1-3, DX 26). All interpretations of the 2003 x-ray found it to be a "1" film quality. Two positive readings showed a 1/1 classification of pneumoconiosis and one reading was rated a 1/0. All of the physicians rendering opinions are B-readers, however, Drs. Barrett and Sargent, who both read the respective 2000 and 2002 x-rays as negative, are also Board-certified radiologists. (DX 26, 12, 10). A doctor who is a B-reader, as well as a Board-certified radiologist, may be credited over a physician who is only a B-reader. *Sheckler*, 7 BLR 1-128 (1984).

To resolve the conflicting diagnoses of the 2002 x-ray interpretations, I may properly assign greater weight to the interpretation by the physician with superior radiological qualifications. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The United States Court of Appeals for

2 Only the X-ray evidence and the physicians' opinions are applicable under these facts. Section 718.202(a)(2) is inapplicable herein because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, Section 718.304 does not apply because there is no x-ray, biopsy, autopsy or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

the Sixth Circuit, within whose jurisdiction the instant case arises, has indicated that the administrative law judge should consider the differences in the qualifications of the readers. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Dr. Barrett is a B-reader and also a Board-certified radiologist Drs. Aycoth, Pathak and Cappiello did not include their credentials but are B-readers. It is permissible to credit the interpretation of a dually-qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999)(en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). Under thisreasoning, the negative reading of Dr. Barrett may permissibly be accorded greater weight than the positive readings of the B-readers, Drs. Aycoth, Pathak, Cappiello, and Baker.

However, the collective weight of three positive interpretations of the most recent x-ray compared to only one negative interpretation weighs in favor of a finding of pneumoconiosis. Admittedly, in *Woodward v. Director, OWCP*, the Sixth Circuit held that the administrative law judge erred by quantitatively evaluating the x-ray evidence without qualitatively assessing it. 991 F.2d 314, 320-321 (6th Cir. 1993). The administrative law judge relied on only the five most recent x-ray interpretations to find that the negative interpretations outnumbered the positive. *Id.* at 320. However, the court's reasoning was based on the conclusion that the administrative law judge had misapplied the later evidence rule. *Id.* The administrative law judge relied on the most recent evidence even though this reliance contradicted the rationale behind the rule. *Conn v. White Deer Coal Co.*, 862, F.2d 591 (6th Cir. 1988) (pneumoconiosis is a progressive disease and, therefore, later evidence showing the disease should be accorded greater weight than negative earlier evidence.)

In contrast to the rule of *Conn*, the administrative law judge in *Woodward* did the opposite. *Woodward*, at 320. He relied on the most recent evidence even though it contained negative evidence of pneumoconiosis while the earlier x-ray interpretations suggested that the Claimant did have pneumoconiosis. *Id.* The Sixth Circuit, thus, concluded that the administrative law judge erred by not resolving the conflict between the early positive evidence, the later negative evidence and the progressive nature of pneumoconiosis. *Id.*; *see, also, Peabody Coal v. Odom*, 342 F.3d 486, 491 (6th Cir. Aug. 25, 2003)(precedent dictates that pneumoconiosis be characterized as a progressive disease).

The facts in the instant case are contrary to those of *Woodward.* The earlier evidence consisted of two negative interpretations conducted by physicians with superior qualifications compared to the single physician who interpreted the x-ray to be positive. (DX 9-10, 12). The newer evidence, in contrast, shows not only three interpretations finding pneumoconiosis, but also a worsening of the pneumoconiosis (1/1, 1/1, 1/0 categorization) from the early diagnosis of stage-one pneumoconiosis or 1/0 classification. This evidence is consistent with the progressive nature of the disease, does not contain the conflict present in the *Woodward* case, and furthermore, it is in accordance with the rationale behind the recent evidence rule. Consequently, the *Woodward* prohibition against quantitative analysis is inapplicable under these facts.

In evaluating the x-ray evidence, I find that the more recent x-ray interpretations will be given greater weight than the interpretations of the 2000 x-ray. I also accord greater weight to the three B-reader interpretations, all positive for pneumoconiosis, because of their quantitative

significance. Therefore, pursuant to 20 C.F.R. §718.202(a)(1), I find that the x-ray evidence of record establishes the existence of pneumoconiosis, and thus, that Mr. Brock has established a material change in condition and his entitlement to benefits will be decided by the record *de novo*.

2. Causation:

The parties stipulated at the hearing to 10 years of coal mine employment by Mr. Allen and as such, he is entitled to a rebuttable presumption that his pneumoconiosis was caused by his coal mine employment. *See* 20 C.F.R. § 718.203(b). To rebut the causation presumption, evidence must be presented demonstrating another cause for claimant's pneumoconiosis, however, no rebuttal evidence was presented. *Id.*

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Benefits are provided under the Act for, or on behalf, of miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). The regulations at § 718.204(b) provide the following five methods to establish total disability: (1) pulmonary function (ventilatory) studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinions; and (5) lay testimony. 20 C.F.R. § 718.204(b). However, it is noted that in a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish total disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. *Supra.* Under this regulation, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function tests or arterial blood gas studies.[3] All ventilatory studies of record, both pre-bronchodilator and post-bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the $FEV_{1,}$ as well as the MVV or FVC, values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards. *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986). I must also consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation*

[3]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

Coal Co., 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

All studies in the record include three tracings and their reliability has not been rebutted.

1. Pulmonary Function Studies

Section 718.204(c) permits a finding of total disability when there are pulmonary function studies with FEV1 values equal to or less than those listed in the tables and either:

1. FVC values equal to or below listed table values; or
2. MVV values equal to or below listed table values; or
3. A percentage of 55 or less when the FEV1 test results are divided by the FVC test results.

A determination on disability will be made by giving the greatest weight to the most recent studies and examinations. Since pneumoconiosis is a progressive disease, later medical evidence is the most probative when evaluating disability. *Clark v. Karst Robbins Coal Co.,* 12 BLR 1-149 (1989). The record contains the results of the most recent pulmonary function study conducted in 2000 by Dr. Baker and found to reflect a decreased FEV_1 but non-qualifying values under the applicable tables. (DX 6). The previous studies are summarized in the Benefits Review Board decision of October 17, 1989. (DX 23, p. 3).[4] As discussed in the Decision and Order of the Benefits Review Board on remand for the third time, three studies produced qualifying results but in two of those studies the administering physician noted less than optimal effort, comprehension, and cooperation by the Claimant. *Brock v. Director,* OWCP, 93-BLA-1178 (Aug. 26 1994) (unpub). The BRB found that the Administrative Law Judge correctly discredited the third qualifying study where a physician with superior credentials opined that the Claimant utilized less than optimal effort and cooperation. *Id*. at 3; *see, generally, Runco v. Director, OWCP*, 6 BLR 1-945 (1984). Since the three qualifying studies are not accorded any probative weight, total disability under §718.204(c)has not been established.

2. Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). While total disability may be found under §718.204(c)(2) if there are arterial blood gas studies with results equal to or less than those contained in the tables, the most

4 This evidence consists of interpretations of seven studies. Four tests produced qualifying values, however, the doctors noted in two of them that Mr. Brock's cooperation was "poor". One study was invalidated and two qualifying studies were accorded less weight because Mr. Brock's cooperation and comprehension were listed as "poor". A pulmonary function study may be assigned no weight under these circumstances. *Runco v. Director, OWCP*, 6 BLR 1-945, 1-946 (1984). The last study was not qualifying and was accorded more weight where the Claimant's cooperation was "good".

recent arterial blood gas study by Dr. Baker did not produce qualifying values. (DX 8). The previous studies are summarized in the Benefits Review Board decision of October 17, 1989. *See, also Brock v. Director,* OWCP, 93-BLA-1178 (Aug. 26 1994) (unpub); (DX 23).

No arterial blood gas studies were subsequently submitted in the instant case. The previous studies did not product credible qualifying studies and therefore, total disability cannot be established under §718.204(c)(2).

3. Medical Opinions

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable gainful employment.

To be accorded probative value, a physician's opinion must be well-reasoned and based upon objective medical evidence containing underlying documentation adequate to support the doctor's conclusions. *Fields v. Iron Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). A physician's reasoned opinion may support the finding of the disease if substantiated by adequate rationale. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993). Weight given to each opinion is proportionate with the value of the documentation and the reasoned conclusions. *Id.* A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

Turning to the two medical opinions of Drs. Varghese and Baker, one a treating physician and one an examining, the fact that Dr. Varghese is a treating physician does not accord his opinion additional weight due to the extent and duration of his history with Mr. Brock. In *Eastover Mining Co. v. Williams*, ___ F.3d ___, Case No. 00-0362 BLA (6th Cir., July 31, 2003), the Court stated with regard to a treating physician's opinion "[a] simple principle is evident: in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade." *See, also,* 20 C.F.R. § 718.204(d) (2001). Dr. Varghese's opinion may be accorded greater weight if it is supported by his on-going treatment and is well-documented. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003)(stating that the court in *Eastover* did not hold that deference to treating physicians is never appropriate).

Dr. Varghese bases his opinion that Mr. Brock is totally disabled on his observations, his experiences treating other coal miners, his clinical evaluations and examinations of Mr. Brock, as well as, on preliminary test results conducted prior to Mr.Brock's cardiovascular surgeries. (CX 4). He also reviewed the medical evidence summarized above including the July 8, 2002 x-ray. Dr. Varghese noted that he observed Mr. Brock's breathing difficulties over the years that he has treated him. *Id.* While Dr. Varghese's opinion seems to be well-reasoned, its documentation is somewhat sketchy. He does not state how often he saw Mr. Brock over the "several years" of treatment nor does he describe the nature of the pre-surgery tests,[5] the significance of the tests to a finding of disability, or the nature of Mr. Brock's respiratory disability other than to say that he has pneumoconiosis and that he has observed his shortness of breath. *Id.* It is unclear how Dr. Varghese discounted the non-qualifying pulmonary function tests and arterial blood gas studies or how he reached the conclusion of "total" disability.

It is insufficient for the medical evidence to merely present a diagnosis of pulmonary or respiratory disease and then declare the claimant to be totally disabled. *Buttermore v. Duquesne Light Co.*, 7 BLR 1-604 (1984); *DeFelice v. Consolidation Coal Co.*, 5 BLR 1-275 (1982); *Dees v. Peabody Coal Co.*, 5 BLR 1-117 (1982). The medical evidence must reveal the justification for the gravity rating of the miner's impairment, *Krushinsky v. Director, OWCP*, 7 BLR 1-622 (1984); *Shortt v. Director, OWCP*, 7 BLR 1-318 (1984); *Brown v. Island Creek Coal Co.*, 4 BLR 1-620 (1982). It must also support the requirement that the miner's impairment be totally disabling. *Buttermore, supra; Shortt, supra*.

Admittedly, the opinion of Dr. Varghese seems to be well-reasoned where it is based on his observations and treatment records over a period of time and includes the Claimant's dust exposure/work history as a determinative factor, as well as, his cigarette smoking history. However, the basis of the total disability conclusion has not been provided. In *Odom*, the Sixth Circuit held that an administrative law judge correctly accorded greater weight to the treating physician's opinion based on his superior qualifications and the "probative and persuasive" medical reports produced over a 16-year history. *Odom*, 342 F.3d at 492. The permissible deference stemmed from the persuasiveness of the opinion rather than the doctor's status. *Id.* Under these facts, the opinion of Dr. Varghese is only somewhat documented and, unfortunately, his credentials are not in the record. Furthermore, he did not provide specific information from his treatment notes other than to say that he had observed Mr. Brock's breathing difficulties over the course of his treatment. Consequently, I accord the opinion some probative weight as a well-reasoned but minimally documented opinion.

Dr. Baker determined that Mr. Brock is capable of returning to coal mine employment. (DX 7). He diagnosed him with a mild impairment with decreased FEV_1, chronic bronchitis, and pneumoconiosis. The basis of Dr. Baker's opinion rests on his examination, the objective medical evidence (chest x-ray, pulmonary function studies, and arterial blood gas studies), the patient history, and a work history and, therefore, it is a well-documented and reasoned opinion. *See, Fields, supra.* I accord Dr. Baker's opinion probative weight on the issue of disability.

5 In Dr. Baker's report, the following surgeries are listed: sinus, blood clot, arm, and neck. (DX 7). Dr. Varghese does not provide details of the types of surgeries he performed or for which Mr. Brock was tested nor did he detail the tests and their results. (CX 4).

The record also contains the opinions of Drs. Begley, Dahhan, Williams, Matheny and Myers, who did not find that Mr. Brock was totally disabled at the time of their respective examinations. *Brock v. Director,* OWCP, 93-BLA-1178 (Aug. 26 1994) (unpub); (DX 23). Of the remaining medical opinions in the original claim, Dr. Jones merely opined that future dust exposure was inadvisable while Dr. Clark found total and permanent disability. *Id.* However, the Benefits Review Board held that Dr. Clark's opinion may be permissibly discredited where his report indicated that Mr. Brock had never smoked and, therefore, the opinion was based on unreliable documentation. *Id.* at p. 4;*see, generally, Fields , supra*.

In conclusion, where the credible evidence of total disability consists only of Dr. Varghese's opinion, which I have found to be of some weight, but it is contradicted by the probative evidence of Dr. Baker's report, I find that Claimant has not met his burden of showing total disability by a preponderance of the evidence under §718.204(b)(2)(iv).

CONCLUSION

I find that Denver Brock's newly submitted evidence is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and thus, a material change in condition under 20 C.F.R. 725.309(d), but has not established entitlement to benefits under the Act because he failed to establish a total respiratory disability under 20 C.F.R. § 718.204(b)(1).

ORDER

It is, therefore,

ORDERED that the claim of Denver Brock for benefits under the Act is hereby DENIED.

ATTORNEY'S FEES

The award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Room S-5220, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, DC 20210.